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## THE COMMON LAW OF BUSINESS TRUSTS

Michael L. Weissman\*

A MASSACHUSETTS OR "BUSINESS TRUST" is a commercial enterprise formed by a declaration of trust wherein property is conveyed to trustees to be held and managed by them for the benefit of such persons as may, from time to time, be holders of transferable shares issued by the trustees and evidencing their beneficial interests in the trust estate.<sup>1</sup> In a true business trust, once the certificate holders have contributed money or conveyed property to the trust, the money or property becomes subject to the sole and exclusive control of the trustees.<sup>2</sup> The trustees are free to deal with the trust assets as they see fit subject only to the limitations imposed upon them by the trust instrument.<sup>3</sup>

The business trust had its genesis in the Commonwealth of Massachusetts as a result of the inability of entrepreneurs to secure charters for the acquisition and development of real estate without the prior consent of the Legislature. Although the usual purpose of these associations was the holding of real estate, the passage of time has witnessed their use in numerous other industrial and commercial ventures. Nonetheless, a distinguishing feature of the business trust continues to be the fact that it is wholly contractual in nature.<sup>4</sup> Unlike a corporation it is not de-

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<sup>1</sup> See, *State Street Trust Co. v. Hall*, 311 Mass. 299, 41 N. E. 2d 30 (1942).

<sup>2</sup> Aaron, *The Massachusetts Trust as Distinguished From Partnership*, 12 Ill. L. Rev. 482 (1918).

<sup>3</sup> However, as is the case with any other form of trust, the trustee has a fiduciary obligation to the beneficiaries or certificate holders. Violation of this fiduciary obligation is grounds for complaint by the certificate holders. *Kotimsky v. Lubin*, 62 F. Supp. 710 (E. D. Ill. 1945). But the honest exercise of discretionary powers vested in the trustees cannot be challenged. *Asher v. Teter*, 314 Ill. App. 200, 40 N. E. 2d 803 (1942).

<sup>4</sup> Everberg, *Advantages and Disadvantages of Common Law Trust Organizations*, 50 Com. L. J. 4 (1945).

pendent upon the laws of a state for its existence and validity.<sup>5</sup> From this fact it is readily discerned that a business trust is subject to only a minimum amount of state regulation—a factor sharply differentiating it from a corporation.

Business trusts gained prominence during the 1920's as a result of their apparent immunity from the federal income tax on corporations.<sup>6</sup> However, this special advantage soon was eliminated<sup>7</sup> and, until quite recently, a business trust was taxed as a corporation<sup>8</sup> under virtually all circumstances.<sup>9</sup> Public Law 86-779<sup>10</sup> approved by the Congress on September 14, 1960 once again has focused attention on business trusts due, in large measure, to the tax benefits<sup>11</sup> which may accrue from the operation of a so-called real investment trust. The new legislation is intended to bestow upon persons who invest in real property an advantage comparable to that enjoyed by persons who pool their funds in a regulated investment company. That is, if the statutory condi-

<sup>5</sup> The business trust has been characterized as the offspring of a union between the unincorporated joint stock company and the trust. In an unincorporated joint stock company the business is carried on by a board of directors or executive committee elected periodically by the shareholders. The business assets are often in the hands of trustees who hold title subject to the directions of the board of directors or managers. Shareholders of an unincorporated joint stock company are deemed to be the proprietors of the business and are liable as principals in both tort and contract. Abolition of the board of directors or managers and vesting the management directly in trustees results in a conversion of an unincorporated joint stock company into a business trust. See, Magruder, *The Position of Shareholders in Business Trusts*, 23 Harv. L. Rev. 423, 424-26 (1923).

<sup>6</sup> *Crocker v. Malley*, 249 U. S. 223 (1919).

<sup>7</sup> *Morrissey v. Commissioner*, 296 U. S. 344 (1935).

<sup>8</sup> Section 7701(a) (3) of the Internal Revenue Code of 1954 defines the term "corporation" to include associations, joint-stock companies and insurance companies. The common form of business trust, with management vested exclusively in the trustees, is usually said to be an "association" taxable as a corporation. *Helvering v. Coleman-Gilbert Associates*, 296 U. S. 369 (1936); *Swanson v. Commissioner*, 296 U. S. 362 (1936); *Sherman v. Commissioner*, 146 F. 2d 219 (6th Cir. 1945).

<sup>9</sup> However, in *Lewis & Co. v. Commissioner*, 301 U. S. 385 (1937), it was held that there is no association taxable as a corporation where there is only a principal-agent relationship in the selling of land, where a trust is adopted purely as a means of making effective the sales of the agent under contract and where the duties of the trustee are merely ministerial in nature.

<sup>10</sup> Adding Sections 856-58 to Subchapter M of the Internal Revenue Code of 1954.

<sup>11</sup> For a full discussion of the tax factors incident to the operation of a real estate investment trust see, Roberts, Feder & Alpert, *Congress Approves Real Estate Investment Trust; Exacting Rules Made*, 13 J. of Taxation 194 (1960).

tions are satisfied the trust acts as a mere conduit and is not subject to taxation—the only tax imposed is that upon the holders of the certificates of beneficial interest.

Undoubtedly, the new Sections of the Internal Revenue Code will furnish a strong stimulant for the formation of business trusts to hold and manage real estate. However, there is little guidance in the new Sections as to the form in which the trust shall be cast. Section 856(a) simply requires that the trust (1) be managed by one or more trustees (2) that the beneficial ownership be evidenced by transferable shares or transferable certificates of beneficial interest and (3) that the trust be otherwise taxable as a domestic corporation.

The purpose of this paper is to examine in greater detail the requirements for a valid common law trust<sup>12</sup> and to point to the dangers which may inure in a declaration of trust which does not conform to these requirements. Reference will also be made to certain problems which may arise in the course of the operation of a business trust.

### PERSONAL LIABILITY OF BENEFICIAL OWNERS

The marketability of certificates of beneficial interest in real estate investment trusts is certain to be affected by whether or not ownership of such certificates carries with it personal liability for debts contracted on behalf of the trust and for tort claims asserted against the trust. In the ordinary trust, established for non-commercial purposes, the beneficiaries have no personal liability in tort or in contract for claims brought by third parties.<sup>13</sup> This stems from the fact that the beneficiaries are usually passive

<sup>12</sup> Beyond the scope of this paper is the jurisprudence of Illinois land trusts. For further information on such trusts see, Garrett, *Legal Aspects of Land Trusts*, 35 *Chi. B. Rec.* 445 (1954); Turner, *Some Legal Aspects of Beneficial Interests Under Illinois Land Trusts*, 39 *Ill. L. Rev.* 216 (1945); Hatfield, *Perpetuities In Land Trusts*, 40 *Ill. L. Rev.* 84 (1945). Also beyond the bounds of the present inquiry are such unrelated problems as the governing law of a trust. In this connection, see, Scott, *What Law Governs Trusts?*, 99 *Trusts & Es.* 17 (1960); Capron, *Situs of Trusts In Conflict of Laws*, 93 *Trust & Es.* 878 (1954).

<sup>13</sup> *Zamis v. Hanson*, 302 *Ill. App.* 404, 24 *N. E. 2d* 59 (1939).

recipients of the sums distributed to them by the trustees. Insofar as a business trust is concerned, the matter assumes a somewhat different complexion. Holders of the certificates of beneficial interest in a business trust often demand a more active role in the administration of trust business. And attorneys who draft such declarations of trust commonly grant to the certificate holders rights equivalent to those enjoyed by shareholders in a corporation. The question then becomes how great may be the powers exercised by the certificate holders without exposing them to the prospect of unlimited personal liability.

There is general agreement that if substantial control over the trustees or over the trust business is reserved to the certificate holders they will be held individually liable for debts of the trust on the theory they are partners rather than beneficiaries of a trust.<sup>14</sup> But there is a large measure of disagreement as to how great the dominion reserved to the certificate holders may be before partnership liability devolves upon the beneficiaries of the trust.<sup>15</sup>

The kinds of powers which are often vested in the trust beneficiaries and which have been the source of controversy are: (1) those permitting the removal of trustees without cause, (2) those permitting the filling of vacancies among the trustees, (3) those permitting the election of trustees annually or upon the expiration of their regular terms of office, (4) those permitting the alteration or amendment of the declaration of trust, (5) those permitting the termination of the association, and (6) a combination of these powers.<sup>16</sup>

A review of the Massachusetts cases, even at this date, reveals that the law in that Commonwealth has not been fully

<sup>14</sup> *Commercial Casualty Ins. Co. v. Pearce*, 320 Ill. App. 221, 50 N. E. 2d 434 (1943); *In Re Estate of Conover*, 295 Ill. App. 443, 14 N. E. 2d 980 (1938); *Goldwater v. Oltman*, 210 Cal. 408, 292 P. 624 (1930); *Belts v. Hackathorn*, 159 Ark. 621, 252 S. W. 602 (1923); *Darling v. Buddy*, 318 Mo. 784, 1 S. W. 2d 163 (1927); 12 C. J. S. #1 (4) at P. 814 (1938).

<sup>15</sup> *Magruder*, *supra*, note 5, at p. 430; Note, *Business Trusts: Liability of Shareholders*, 18 Calif. L. Rev. 438 (1930).

<sup>16</sup> *Jeanblanc*, *Business Trusts—Personal Liability of Trustees and Beneficiaries*, 25 Ill. B. J. 112 (1936).

crystallized on the question of what powers may be reserved to certificate holders without subjecting them to personal liability. Perhaps the confusion flows from the fact that these judicial inquiries have arisen in the midst of a reservation of a multiplicity of these powers and there has been little opportunity to deal with any one of them in isolation.

Nonetheless, it has been held that where the trust instrument fails to provide for meetings of certificate holders, vests management of the trust estate exclusively in trustees and simply permits the beneficial owners to consent to an alteration, amendment or termination of the trust indenture, there is a true business trust.<sup>17</sup> Moreover, where the trustees had the sole and unrestricted power to hold, manage and dispose of the trust estate, the mere reservation of a power to remove the trustees by majority vote of the certificate holders was said to be insufficient to convert the association into a partnership.<sup>18</sup> But a purported business trust has been held to be a partnership where the certificate holders, by two-thirds vote, had power to remove the trustees at any time without assigning cause, to fill vacancies among the trustees, to terminate the trust and, by majority vote, to amend the declaration of trust or alter, amend or repeal the by-laws.<sup>19</sup> If the beneficial owners are given power to direct the sale of the trust property and terminate the trust thereby, as well as the right, by three-fourths vote, to remove trustees and fill vacancies, however created, a partnership relationship will result.<sup>20</sup> In short, the trend of the Massachusetts decision is to classify a supposed business trust as a partnership, with the attendant unlimited personal liability of the certificate holders, when the latter enjoy the right of arbitrary removal of the trustees at any time in conjunction with other significant powers such as alteration or amendment of the trust indenture or termination of the association.<sup>21</sup>

<sup>17</sup> *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355 (1913).

<sup>18</sup> *Downey Co. v. Whistler*, 284 Mass. 461, 188 N. E. 243 (1933).

<sup>19</sup> *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009 (1914).

<sup>20</sup> *Howe v. Chmielski*, 237 Mass. 532, 130 N. E. 56 (1921). See also, *Priestley v. Treasurer and Receiver General*, 230 Mass. 452, 120 N. E. 100 (1918).

<sup>21</sup> See *Commissioner of Corporations & Taxation v. City of Springfield*, 321 Mass. 31, 71 N. E. 2d 593 (1947) in which the certificate holders voted annually

In Illinois there was some doubt as to the validity of business trusts<sup>22</sup> until the celebrated case of *Schumann-Heink v. Folsom*.<sup>23</sup> Moreover, there was an early misconception as to the true test to be applied in passing upon the validity of common law trusts the court stating that the *actual exercise* of reserved powers in the certificate holders was determinative<sup>24</sup> rather than the reservation of such powers in the declaration of trust. At the present time, however, Illinois follows the generally accepted approach<sup>25</sup> and judicial inquiry is directed to the terms of the indenture. In addition, Illinois jurisprudence has recognized that although the terms of the trust instrument may be ineffective to immunize certificate holders in a business trust or joint stock company from liability to third persons, such terms *do* control the rights of the certificate holders *inter se*.<sup>26</sup>

Although clearly significant in its definitive exposition of the nature of business trusts, *Schumann-Heink v. Folsom* sheds little light on the matter of what rights may be saved to the certificate holders. In that case, the trustees themselves had authority to increase the number of trustees, to fill any vacancies among the trustees for whatever cause, to promulgate rules and regulations

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upon trustees and could effect a termination of the trust but lacked power to remove the trustees at will. The association was held to be a true business trust rather than a partnership.

<sup>22</sup> *Greene v. The People*, 150 Ill. 513 (1894) (quo warranto proceeding in which it is not clear that the court is discussing a business trust). See especially, *Guthmann v. Adco Dry Storage Battery Co.*, 232 Ill. 327, 332 (1924), wherein the court said: "there is doubt in the mind of this court as to whether the so called 'Massachusetts Trust' is legal in the State of Illinois."

<sup>23</sup> 328 Ill. 321, 159 N. E. 250 (1927).

<sup>24</sup> In *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246 (1893) the precise question presented was whether or not the trust was executed and the trustees divested of their legal title under the Statute of Uses. Finding that the trustees had active duties in the management of trust business, it was concluded that there was no divestiture. Furthermore, it should be noted that the trust agreement gave the beneficial owners power to remove trustees at will, to fill vacancies however caused, to appoint successor trustees and, at regular meetings, to direct the activities of the trustees. The opinion has been expressed that had *Hart v. Seymour* arisen after the decision in *Williams v. Inhabitants of Milton*, *supra*, note 17, a different result would have been reached. *Judah, Possible Partnership Liability Under The Business Trust*, 17 Ill. L. Rev. 77, 88 (1922). *Contra*: *Hildebrand, The Massachusetts Trust*, 1 Tex. L. Rev. 127, 146 (1923).

<sup>25</sup> *Anno.*, *Massachusetts Or Business Trusts*, 156 A. L. R. 22, 114 (1945).

<sup>26</sup> *Hossack v. Ottawa Development Assn.*, 244 Ill. 274, 91 N. E. 439 (1910); *Hunter v. Winter*, 268 Ill. App. 487 (1932).

for the administration of the trust assets and to fix their own compensation as well as that of any officers or employees of the trust. No rights were possessed by the beneficial owners other than the passive rights to receive dividends, declared at the discretion of the trustees, and to their proportionate share of the trust estate on winding up.<sup>27</sup>

Where the beneficial owners retained control over the trustees in the actual management of the trust business, little difficulty was encountered in declaring the said owners to be partners.<sup>28</sup> And in an instance in which the purported members of a business trust annually elected five of their number to be a managing committee which managing committee controlled the trustees (who possessed little more than bare legal title to the trust assets) in carrying on the affairs of the trust, a partnership was said to have been created.<sup>29</sup>

*Levy v. Nellis*<sup>30</sup> and *Commercial Casualty Ins. Co. v. Pearce*<sup>31</sup> are the leading Illinois cases in which guidance may be sought as to the extent of the powers which may be conferred upon the certificate holders in a business trust. In *Levy v. Nellis* the beneficiaries of the trust were granted power, by a two-thirds vote, to amend the trust agreement and, by a majority vote, to elect trustees at five year intervals. Interim vacancies among the trustees, however, were to be filled by a majority vote of the remaining trustees. Reviewing the amount of control reserved to the certificate holders the court held that a true business trust had been created. No special significance was attached to the fact

<sup>27</sup> Attention is drawn to the fact that in *Schumann-Heink v. Folsom*, the question before the court was the liability of the trustees as partners. Nevertheless, the case should stand as clear authority for the immunity from individual liability of the certificate holders under similar factual conditions.

<sup>28</sup> *Weissbrodt v. H. W. Elmore & Co.*, 262 Ill. App. 1 (1931).

<sup>29</sup> In *re Estate of Conover*, *supra*, note 14. The facts of this case reveal an association bearing a close resemblance to an unincorporated joint stock company. It is submitted that although the promissory note on which the claim was based described the association as a co-partnership, the better rationale on which to have based a finding of personal liability of the decedent was that an unincorporated joint stock company had been formed.

<sup>30</sup> 284 Ill. App. 228, 1 N. E. 2d 251 (1936).

<sup>31</sup> 320 Ill. App. 221, 50 N. E. 2d 434 (1943).



that the beneficial owners could periodically elect trustees.<sup>32</sup> And in *Commercial Casualty Ins. Co. v. Pearce* a business trust was declared valid even though certain persons occupied the dual status of trustee and certificate holder.<sup>33</sup> No powers of any consequence had been delegated to the beneficiaries.

Thus, in Illinois the law relating to business trusts is not sufficiently explicit to provide a complete guidepost to the scope of the authority which may be vested in certificate holders. *Levy v. Nellis* clearly permits the beneficiaries of such a trust to have power to elect the trustees at stated intervals and to amend the trust instrument. Assuming that the Illinois courts will, as in the past, adhere closely to the Massachusetts decisions it seems advisable to refrain from coupling the power to alter, amend or terminate the declaration of trust or to elect trustees from time to time with the power to remove the trustees at will.<sup>34</sup> Moreover, the greater the cumulation of powers in the beneficiaries the greater becomes the danger of exposure to unlimited personal liability.

<sup>32</sup> Among the authorities which the court cited was *Reichert v. Missouri & Illinois Coal Co.*, 231 Ill. 238, 244, 83 N. E. 166 (1907), wherein the court stated: "One who creates a trust has a right to provide a method for filling vacancies and for appointing successor trustees."

<sup>33</sup> Of course, if all the parties interested in the trust are both trustees and certificate holders and there are no independent trustees the legal and equitable estates merge and there is no trust. Thulin, *A Survey of The Business Trust*, 16 Ill. L. Rev. 369, 374-75 (1922).

<sup>34</sup> See Warren, *Corporate Advantages Without Incorporation* 402 (1929). It has been said that beneficiaries of a business trust should have immunity from unlimited personal liability even though they are able to: (1) fill vacancies among the trustees, (2) elect trustees from time to time, (3) remove trustees at will, (4) alter or amend the trust indenture, or (5) terminate the trust. Magruder, *supra*, note 5, at p. 443. Other writers exhibit a wide area of disagreement on this matter. A rather conservative view is expressed in Judah, *supra*, note 24, at p. 95 where it is stated that the certificate holders may only have the power to consent to the filling of vacancies among trustees or the making of amendments to the trust agreement and that said consent should be given individually rather than at a meeting. In *Hildebrand, The Massachusetts Trust*, 1 Tex. L. Rev. 127, 153 (1923) it is submitted that the certificate holders may have authority to terminate the trust or to amend it from time to time. Perhaps the most conservative point of view is expressed in Brown, *Common Law Trusts as Business Enterprises*, 3 Ind. L. J. 595, 602 (1928), wherein it is said that the beneficial owners should have no authority to fill vacancies among the trustees and should not hold meetings. And in *Everberg, supra*, note 4, at p. 4 it is agreed that the beneficiaries may be given power to elect trustees at stated intervals. On the latter point see, *Home Lumber Co. v. State Charter Board*, 107 Kan. 153, 190 P. 601 (1920), recognizing that such authority may be vested in the certificate holders.

## PERSONAL LIABILITY OF TRUSTEES

Trustees of a business trust are personally liable in tort<sup>35</sup> and in contract<sup>36</sup> for obligations incurred in the administration of trust business. The rationale of this rule is that the trustees are not acting simply as agents for the certificate holders but as principals who are administering the trust property in accordance with the terms of the trust instrument.

Since liability of this magnitude will be of great significance to those who are called upon to act as trustees of real estate investment trusts, a discussion of the means by which the trustees may limit their liability is in order. Although it is difficult to limit tort liability,<sup>37</sup> it is feasible to eliminate the personal liability of the trustees with respect to contracts.<sup>38</sup>

In *Hunter v. Winter*,<sup>39</sup> the filing of the declaration of the trust in the office of the County Recorder was held to be ineffective to absolve the trustees of their personal liability on a lease negotiated on behalf of the trust. Moreover, a signature "as trustee" is deemed to be merely *descriptio personae*<sup>40</sup> and the underlying obligation remains that of the trustee personally.<sup>41</sup> On the other hand it is universally recognized that the trustees may eliminate their personal liability by stipulating in the contract that they shall not be personally responsible and that the other contracting party shall look solely to the trust assets for satisfaction of his

<sup>35</sup> 2 Scott, *Trusts* #274 (1939) at p. 1540; *Sleeper v. Park*, 232 Mass. 292, 122 N. E. 315 (1919).

<sup>36</sup> *Taylor v. Davis*, 110 U. S. 330 (1883); *Austin v. Parker*, 317 Ill. 348, 148 N. E. 19 (1925).

<sup>37</sup> *Hildebrand, Liability of The Trustees, Property and Shareholders of a Massachusetts Trust*, 2 Tex. L. Rev. 139, 145 (1924).

<sup>38</sup> It has been held in Illinois that a single trustee who contracts on behalf of the trust and is not shown to have had authority to bind his co-trustees is solely liable on the obligation. *Uihlein v. Budd*, 252 Ill. App. 487 (1929).

<sup>39</sup> *Supra*, note 26.

<sup>40</sup> *White, Trustee's Avoidance of Personal Liability On Contracts*, 3 Temple L. Q. 117, 131 (1929). *Contra*, *Thulin, supra*, note 33, at p. 374.

<sup>41</sup> *Austin v. Parker, supra*, note 36. But in *Barkhausen v. Continental Illinois National Bank*, 3 Ill. 2d 254, 120 N. E. 2d 649 (1954) rev'g 351 Ill. App. 388, 115 N. E. 2d 553 (1953), it was concluded that a signature "as trustee" raises an ambiguity explicable by parol evidence which may indicate the extent of the liability intended to be created.

claim.<sup>42</sup> Even though there is support for the proposition that the agreement absolving the trustee of personal liability may be oral or even implied from the surrounding circumstances,<sup>43</sup> a judicious trustee would be ill-advised to settle for less than an express stipulation in a written contract.

The Illinois cases seem to be in conflict on the question of whether personal liability attaches to the trustees where the other contracting party has full knowledge of the character of the trust and the trust indenture purports to save the trustees from individual liability.<sup>44</sup> In *H. Kramer & Co. v. Cummings*,<sup>45</sup> such knowledge on the part of the other contracting party limited the recovery exclusively to the assets of the trust. But subsequent cases cast doubt on this rule and require an express stipulation in the contract before the trustees can successfully assert their exemption from personal liability.<sup>46</sup>

Unquestionably, the best course for the trustees of a business trust to pursue in saving themselves from personal liability on contracts is to insert a term in the contract negating their own responsibility and insisting that the other contracting party look only to the trust corpus. So far as tort liability is concerned, perhaps the best procedure to safeguard the trustees is to draft the trust indenture with a provision empowering the trustees to obtain insurance against tort claims.<sup>47</sup> Even in the absence of such a clause, however, the trustees would possess an equitable right of reimbursement out of the trust assets and from the beneficiaries themselves in the event the trust estate is insufficient.<sup>48</sup>

<sup>42</sup> *Schumann-Heink v. Folsom*, 328 Ill. 321, 159 N. E. 250 (1927); *Carpenter v. Elmer R. Sly Co.*, 109 Cal. App. 539, 239 P. 162 (1930); *Jessup v. Smith*, 223 N. Y. 203, 119 N. E. 403 (1918). Note, *Business Trusts—Trustee's Personal Liability on Contracts—Methods of Avoiding*, 18 Minn. L. Rev. 860, 864 (1934).

<sup>43</sup> *Mitchell v. Whitlock*, 121 N. C. 166, 28 S. E. 292 (1897).

<sup>44</sup> Note, *Associations—Massachusetts Trusts—Personal Liability of Trustees on Contracts*, 36 Mich. L. Rev. 1184, 1186 (1938).

<sup>45</sup> 225 Ill. App. 26 (1922).

<sup>46</sup> *Reconstruction Finance Corporation v. Goldberg*, 143 F. 2d 752 (7th Cir. 1944), cert. den., 323 U. S. 733 (1944), rehear. den., 323 U. S. 814 (1944); *Review Printing & Stationery Co. v. McCoy*, 291 Ill. App. 524, 10 N. E. 2d 506 (1937). To the same effect see, *Carr v. Leahy*, 217 Mass. 438, 105 N. E. 445 (1914).

<sup>47</sup> *Hildebrand*, *supra*, note 37.

<sup>48</sup> *Symmonds, Business Trusts*, 15 Marq. L. Rev. 211, 215-16 (1931). For further discussion of the trustee's right of reimbursement see, *Stone, Theory of Liability of Trust Estates*, 22 Col. L. Rev. 527 (1922); *Scott, Liabilities in the Administration of Trusts*, 28 Harv. L. Rev. 725 (1915).

## PROBLEMS IN THE ADMINISTRATION OF BUSINESS TRUSTS

Although Illinois recognizes the right of a business trust to transact business under an adopted trade name,<sup>49</sup> the trust cannot sue or be sued<sup>50</sup> under such a name. Therefore, in Illinois, unlike some other jurisdictions,<sup>51</sup> the proper parties for purposes of suit are the trustees of the business trust.

As is true of other kinds of trusts, the trustees of a common law trust occupy a fiduciary relationship towards the beneficiaries<sup>52</sup> and must remain aloof from any fraud or self-dealing. In addition, they may not effectively bind the trust by a contract which is in excess of their powers under the trust indenture.<sup>53</sup> If the trustees have authority to amend the trust agreement upon the consent of the certificate holders, any information which accompanies the solicitation of such consent must be a full disclosure of all relevant facts and, without such full disclosure, the consent so obtained is void.<sup>54</sup>

Absent any authority in the trust instrument, the trustees lack the right to appoint an agent for the beneficial owners.<sup>55</sup> But if the trustees have power to appoint successor trustees upon notice to the certificate holders, appointments made without such notice are valid, the requirements as to notice being merely informational in nature.<sup>56</sup> Finally, if the trustees are attempting to solicit support for the sale of the trust assets, it is a breach of trust for them to refuse a demand of a certificate holder, who opposes the proposal, for a list of other certificate holders.<sup>57</sup>

<sup>49</sup> *Remington v. Krenn & Dato*, 289 Ill. App. 548, 7 N. E. 2d 618 (1937).

<sup>50</sup> *Vischer v. Dow Jones & Co.*, 325 Ill. App. 104, 59 N. E. 2d 884 (1945); *Guthmann v. Adco Dry Storage Battery Co.*, *supra*, note 22.

<sup>51</sup> *American R. Exp. Co. v. Asher*, 218 Ky. 172, 291 S. W. 21 (1927); *Wagoner Oil & Gas Co. v. Marlow*, 137 Okla. 116, 278 P. 294 (1929).

<sup>52</sup> By way of contrast, it has been held that one certificate holder has no fiduciary duty to his co-holders. *Krensky v. DeSwarte*, 335 Ill. App. 435, 82 N. E. 2d 168 (1948).

<sup>53</sup> *Sykes v. Parker*, 250 Ill. App. 299 (1928).

<sup>54</sup> *Shapiro v. Chicago Title & Trust Co.*, 328 Ill. App. 650, 66 N. E. 2d 731 (1946) (real estate liquidation trust).

<sup>55</sup> *Hines v. United States*, 90 F. 2d 957 (7th Cir. 1937); *cert. den.*, 302 U. S. 756 (1937).

<sup>56</sup> *860 Lake Shore Drive Trust v. Gerber*, 19 Ill. App. 2d 1, 153 N. E. 2d 253 (1958).

<sup>57</sup> *Wallace v. Malooly*, 4 Ill. 2d 86, 122 N. E. 2d 275 (1954) (real estate liquidation trust).